IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 754.

THE EMERY TRANSPORTATION COMPANY, *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, ET AL., *Defendants-Appellees.*

PETITION FOR REHEARING.

This is the petition of The Emery Transportation Company, appellant, for rehearing. Appellant filed, on April 15, 1950, an appeal from the final judgment and decree entered on February 14, 1950, by a specially constituted District Court of three judges, established pursuant to Section 2284 of Title 28 of the United States Code, dismissing it's complaint seeking to set aside an order of the Interstate Commerce Commission. Appellees, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court, filed a motion to affirm the judgment and decree of the aforesaid District Court. Reply was filed thereto by appellant. This Court, on May 15, 1950 granted the motion to affirm.

Appellant, in *The Emery Transportation Company Purchase—Nowak Trucking Co.*, 40 M. C. C. 835 and 45 M. C. C. 805, was authorized by the Interstate Commerce Commission to purchase operating rights authorizing contract carrier services from Chicago, Illinois, to points and places in Wisconsin. In *The Emery Transportation Company—Control and Merger*, 50 M. C. C. 433, appellant was authorized to purchase other contract carrier operating rights authorizing services from Jeffersonville, Indiana, to Chicago, Illinois. In approving the transaction, the Commission specifically permitted the unification of these rights with those already held by appellant, including the rights purchased from Nowak authorizing services from Chicago to points in Wisconsin.

Appellant filed certain rates with the Commission which would have unified these rights by providing through service from Jeffersonville through Chicago to points in Wisconsin. In *Soap, Toilet Articles—The Emery Transportation Company*, Investigation and Suspension Docket No. M-2854 (March 14, 1949 and July 6, 1949), the Commission found the through service to be beyond the scope of appellant's operating authority, and instructed it to discontinue performing such services. Appellant, within the time allowed by statute, filed a complaint in the United States District Court for the Southern District of Ohio, Western Division, requesting that the aforesaid order of the Commission be enjoined and set aside. The lower court issued a final judgment and decree without opinion, dismissing appellant's complaint. Whereupon, appellant took a direct appeal to this Court. Appellees filed a motion to affirm, contending that there was no substantial question involved. Appellees replied thereto.

The sole question raised by appellees' motion and appellant's reply thereto was whether the case before this Court presents any substantial question. Appellant, in its reply, made no effort to argue the actual issues in the case. It simply undertook to convince the Court that there is a substantial question to be decided.

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Appellees contended that the decisions of this Court support the Commission's interpretation of the statute, and for that reason no substantial question is here presented. To sustain this argument, appellees cited three cases, each of which will be considered herein briefly.

In *Noble* v. *United States,* 319 U. S. 88, the Commission had imposed in the permit of Noble a restriction which limited this carrier to serving a certain class of shippers. The sole issue before the Court was whether the Commission could lawfully impose such a restriction. This Court concluded that it could. In the instant case there is no question of a restriction as to shippers who may be served being placed in the permit, for the Commission has not undertaken to impose in the permit any restriction. It would seem, therefore, that the Noble Case, *supra,* has no bearing whatsoever on the instant case.

In *Acme Fast Freight* v. *United States,* 34 F. Supp. 968, appellant, a freight forwarder, had entered into certain joint rate arrangements with common carriers for the purpose of avoiding the regular tariff charges. The issue before the Court was the legality of these arrangements. This Court concluded that these agreements were unlawful because joint rate arrangements could not be entered into between a freight forwarder and a common carrier, for the reason that freight forwarders had always been considered shippers. In the instant case appellant is not asking to enter into joint rates with anyone. It would hardly seem, therefore, that the decision of this Court in the Acme Case, *supra,* would control the issues here involved.

In *United States* v. *Rosenblum Truck Lines, Inc.,* 315 U. S. 50, appellee transported property for other motor carriers and contended that it was entitled to either a certificate or permit under the so-called "grandfather clause" of the Motor Carrier Act, 1935. This Court concluded that Rosenblum was not entitled to either a certificate or permit. In the instant case there is no question raised as to the appellant's right to a permit. It would hardly seem,

therefore, that the Rosenblum case, *supra,* has any bearing on the instant case.

The issue here presented to the Court is whether the Commission, after authorizing appellant to unify two separate operating permits, and after issuing such authority, may later, in a rate case involving the reasonableness of charges, prohibit the unified service previously authorized.

It is respectfully submitted to this Court that this issue has never been decided by it. In fact, we know of no judicial opinion that has ever been handed down on this subject. The matter is of a great deal of importance, not only to appellant, but to the motor carrier industry generally, as evidenced by the fact that several trade associations intervened in the court below. In spite of the importance of this case to the motor carrier industry and to the appellant, and in spite of the fact that counsel for the appellant in arguing the matter before the court below, stated that the action had been brought largely for the purpose of obtaining a judicial opinion, such opinion has never been rendered.

That this case presents a substantial question is clearly shown by the action of this Court in *United States, et al.* v. *Rock Island Motor Transit Co., et al.,* No. 654, and *United States, et al.* v. *Texas & Pacific Motor Transport Co.,* No. 713-14. In the Rock Island Case, No. 654, probable jurisdiction was noted by this Court on March 27, 1950. In the Texas & Pacific Case, No. 713-14, probable jurisdiction was noted by this Court on May 1, 1950.

In both the Rock Island and Texas & Pacific cases, the Interstate Commerce Commission had approved the purchase of operating rights by these carriers without imposing a so-called key-point restriction prohibiting the transportation of property through certain key points. At a later date the Commission amended the certificates by imposing the aforesaid restriction. In both cases the lower courts set aside the Commission's orders because the further limitation imposed in the certificates constituted a substantial change of the operating rights previously

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granted, and since the Commission did not follow the procedure provided for in Section 212, Part II of the Interstate Commerce Act, the orders were in excess of its authority under the Act.

The Interstate Commerce Commission authorized appellant to perform a through service through Chicago when it authorized the unification of the operating rights here in question. The order of the Commission here complained of prohibits through service just as effectively as though the Commission had attempted to write into the permit a key-point restriction. This action was not taken by the Commission pursuant to the provisions of Section 212. It would seem, therefore, that if the Rock Island and Texas & Pacific cases involve substantial questions, the instant case does also; for the Commission is here attempting to do, by indirection, the same thing it attempted to do in those cases by direction; namely, partially revoke operating authority without going through the procedure established by Congress in the Act.

By this petition appellant is not attempting to argue the merits of its appeal. Its sole contention is that there is a substantial question involved. None of the cases cited by appellees has any bearing whatsoever on the issue involved in this case. This issue is not only a novel one to this Court—it is one upon which there has never been a judicial opinion. The real question involved is identically the same as the one involved in both the Texas & Pacific and the Rock Island cases. The only essential difference seems to be, in those cases the Commission's decision was annulled and set aside, and it, therefore, has had to make the appeal; whereas, in the instant case, since the order of the Commission was affirmed, the burden of appealing does not rest upon the Commission. It would appear, therefore, that, since the Court has allowed the Commission's appeal in the Texas & Pacific Case and the Rock Island Motor Transit Co. Case, it should allow the appeal in the instant case.

Petitioner respectfully requests that this Court reconsider its order of May 15, 1950, granting appellees' motion to affirm; and that, upon reconsideration, the motion be denied and probable jurisdiction noted.

Dated May 29, 1950.

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Certificate of Service.

I certify that a copy of the foregoing Petition for Rehearing was served on counsel of all parties of record by mail this 29th day of May, 1950.

CLARENCE D. TODD.